THE HON'BLE SRI JUSTICE B.CHANDRA KUMAR

APPEAL SUIT No.1402 of 1996
and
CROSS OBJECTIONS (SR) No.62620 of 1998

Dated:- 27th February, 2013

Between:-

Reddi Radhakrishna

…Appellant

AND

Reddy Lakshmi and others

…Respondents

THE HON'BLE SRI JUSTICE B.CHANDRA KUMAR

APPEAL SUIT No.1402 of 1996
and
Cross Objections (SR) No.62620 of 1998

COMMON JUDGMENT:-

This appeal is directed against the judgment and decree dated 11.12.1995 passed in O.S.No.98 of 1989 by the Subordinate Judge, Ramachandrapuram, East Godavari District.

The appellant herein is the second defendant and the first respondent herein is the plaintiff and other respondents are other defendants in the suit and for the sake of convenience, the parties will be hereinafter referred to as per their array before the Court below.

The brief facts of the case are as follows:-

The plaintiff is the second wife of Late Surya Rao. The first wife of Late Surya Rao – Sarojini died in the year 1971. The second defendant is the son of Late Surya Rao through his first wife Sarojini. First defendant is the mother of Late Surya Rao. She died during the proceedings of the suit. The third defendant and Late Surya Rao jointly purchased Item No.1 of 'A' Schedule properties. The other contesting

defendants are said to be the purchasers of some of the 'B' schedule properties during the pendency of the suit. Late Surya Rao was having Item No.1 of 'A' schedule properties, i.e., Acs.1.33 cents of land. Late Sarojini was given 0.40 cents of land by her father. Late Surya Rao was working as a Clerk in Mandapeta Municipality. He seems to have purchased a house in the year 1966. After Late Sarojini gave birth to the second defendant, Late Surya Rao underwent family planning operation. The initial case of the plaintiff is that at the instance of D.W.3 – the father of Late Sarojini, Late Surya Rao sold away his ancestral house situated at Mandapeta and about 40 cents of vacant site standing in the name of his first wife Sarojini and gave entire sale proceeds to his son – the second defendant towards and in lieu of his share in the joint family property. Thus, the original case of the plaintiff is that there was a partition between the plaintiff and the second defendant soon after the death of Sarojini and all 'A' schedule properties are the exclusive properties of Late Surya Rao and she got 1/3rd share in all 'A' schedule properties. She filed a suit for partition and other consequential reliefs.

Defendants 1 and 2 are sailing together. The initial stand of the defendants is that there was no partition between Late Surya Rao and the second defendant as claimed by the plaintiff and all the 'A' Schedule properties are the joint family properties and, therefore, the plaintiff is not entitled to 1/3rd share, but she is entitled to only 1/6th share. The case of the third defendant is that himself and Late Surya Rao jointly purchased Item 2B of 'A' schedule properties under registered sale deed dated 25.08.1983 and he is having half share in that

item. The first defendant had categorically averred as follows:-

> "The said Suryarao did not divide with his son Radhakrishna who is the 2nd defendant herein and the joint family between the 2nd defendant and Late Surya Rao continued till the death of Late Surya Rao."

> "The said joint family also purchased a house bearing Door No.4-5-3 at Mandapeta in the year 1966 and subsequently, the said house was sold away by Surya Rao and his son while the second defendant was a minor, on 28.06.1973. The said document itself clinchingly disproves the plaintiff's contention that the 2nd defendant was divided with his father in the year 1972."

> "Late Surya Rao's first wife Sarojini was having Ac.0-40 cts. of vacant site situated at Mandapeta as her stridhana property and as she died intestate, that property was devolved upon her husband Suryarao and the 2nd defendant herein and subsequently on 03.02.1984 they jointly sold away that property in favour of others for a sum of Rs.20,000/-. The said Surya Rao and his son Radhakrishna comprising of a joint family purchased a site at Mandapeta in which Late Surya Rao constructed a building bearing Door No.17-1-41 which is described in the schedule annexed to this written statement with the sale proceeds of the house bearing door No.4-5-3 and also a portion of the sale proceeds which are realized under the sale deed dated 03.02.1984."

The written statement of the first defendant is adopted by the second defendant.

Basing on pleadings, the Court below framed the following issues and additional issues for trial:-

Issues:-

1. Whether there is a partition between the second defendant and his father 15 years ago?

2. Whether the plaint schedule property is a joint family property or the individual share of the second defendant's father?
3. Whether the plaintiff is entitled to 1/3rd share or 1/6th share?
4. To what relief?

The trial proceeded on the issues as originally framed. When the case was posted for arguments, the plaintiff filed I.A.No.27 of 1983 seeking amendment of the plaint and to add 'B' schedule properties. The said I.A. was allowed by order dated 10.12.1983 and the plaintiff accordingly amended the plaint. As per amended plaint, the case of the plaintiff is that during the last week of December, 1992, she had learnt that there are some more properties as shown in 'B' schedule, which Late Surya Rao acquired in the name of second defendant, but, those properties are also joint family properties. The plaintiff specifically pleaded that the second defendant was very young and had no independent means or source of any income to acquire 'B' schedule properties. It is necessary to extract the pleadings of the plaintiff as per the amended plaint.

> "The second defendant is contending in this suit that whatever properties Late Surya Rao acquired either in his name as in the names of others, were all acquired by him with the help of joint family nucleus and that therefore all such properties constitute joint family properties. The 2nd defendant is also contending in the suit that till the death of Surya Rao, he and the first defendant were members of joint family, that there was no division at all between both of them and that Late Surya Rao was the family manager till his death. If these circumstances are taken to be true and correct, then the plaintiff submits that all the properties which Late Surya Rao acquired have to be taken as joint family

properties."

The second defendant filed additional written statement, mainly contending that after the death of his mother, he was brought up by his maternal grand parents, who used to give presentations to him on the occasion of his birthdays and other festivals and he used to save the money. It is also his case that he married a girl from affluent family who provided considerable money to his wife and at the time of his marriage, he was given cash presentations and with that money, he started 'Laxmi Agencies' in 1984 which continued till 1988. He further pleaded that with the monies provided by maternal grand parents, he purchased Item Nos.4 and 5 of 'B' Schedule properties. It is also his case that he had withdrawn Rs.45,000/- lying to his credit in 'Laxmi Agencies' and purchased Item No.3 of 'B' schedule properties with his savings and income from the properties already acquired, he purchased 1/3rd share in item Nos.6 to 9 of 'B' Schedule properties along with two others and subsequently, he sold those properties. It is also his case that he had deposited Rs.10,000/- in Mandapeta Municipal Employees Cooperative Credit Society and with the periodical interest drawn from the said society, he acquired Item No.2 of 'B' schedule properties. According to him, item No.1 of 'B' schedule properties was purchased on 13.05.1992 during the pendency of the suit and after issuing legal notice for partition by the plaintiff. He had also started a Bar and Restaurant and acquired item No.1 with the income from the said Bar and Restaurant. Thus, his specific case is that 'B' schedule properties are his self acquisitions. The second defendant further contended that

amendment of the plaint is *contra* to her earlier admission of partition between himself and his father. It is also his case that the income from Acs.1.33 cents of land was not sufficient to acquire any property. It is also averred that Late Surya Rao was drawing a meager salary and he was suffering from Cancer and was on medical leave till his death and he had no funds to acquire 'B' schedule properties.

There is no need to refer to the other pleadings of other defendants in this appeal.

The Court below framed the following additional issues for trial subsequently:-

Additional Issues dated 11.02.1994:-

1. Whether the plaintiff is entitled to claim partition of plaint B schedule properties?
2. Whether the plaint B schedule properties and the share of 2nd defendant in Nellore properties are his self acquired properties as pleaded by D-2?
3. Whether the plaint B schedule properties were acquired by Late Surya Rao from joint family nucleus and that they are liable for partition?
4. Whether the suit for partition of the B schedule properties on the basis of Benami transaction is maintainable in view of the provisions of S-4 of the Benami Transactions Prohibition Act?

Additional issues dated 12.09.1994

1. Whether items 5 to 9 of B schedule properties are exclusive properties of the 2nd defendant and if so, are not liable for partition?
2. Whether the suit is liable to be dismissed against defendants 4 and 5?

On behalf of the plaintiff, the plaintiff herself was

examined as P.W.1 and Exs.A.1 to A.35 were marked. On behalf of the defendants, the first defendant was examined as D.W.1, second defendant was examined as D.W.2 and D.Ws.3 to 8 were examined as Exs.B.1 to B.22 were marked. Exs.X.1 to X.22 were also marked through Court.

The Court below, on appreciation of the oral and documentary evidence available on record, on issues 1 and 2 and additional issues 1 to 3 dated 11.02.1994 and additional issues dated 12.09.1994, came to the conclusion that the plaintiff – P.W.1 could not have any personal knowledge about the partition between Late Surya Rao and the second defendant and in view of the pleadings of the defendant, it cannot be said that the plaintiff cannot seek partition of 'B' schedule properties. The Court below gave a categorical finding that there was no partition between Late Surya Rao and the second defendant. The Court below also found that there was joint family nucleus sufficient to acquire 'B' schedule properties. The Court below also came to the conclusion that the second defendant was only 19 years old as on the date of deposit of Rs.10,000/- in the name of the second defendant and that there is no satisfactory evidence to show that the second defendant had purchased 'B' schedule properties (except Item No.1) with hisown funds. As far as additional issue No.4 dated 11.02.1994 is concerned, both the counsel appearing before the Court below admitted that Benami Transactions Prohibition Act is not applicable to this case. Holding so, the Court below decreed the suit. Aggrieved by the same, the second defendant filed this appeal.

Heard the arguments.

The points that arise for consideration in this appeal are (1) Whether there was sufficient income from the nucleus of the joint family to acquire properties by Late Surya Rao; (2) Whether 'B' schedule properties are the self acquired properties of the second defendant; (3) Whether the admissions made by the plaintiff make her disentitle to seek partition of 'B' schedule properties; (4) Whether the amendment sought by the plaintiff is barred by limitation; and (5) Whether the second defendant can seek partition of the written statement schedule properties.

Point No.1:-

Now let us see whether there was sufficient income from the nucleus of the joint family to enable Late Surya Rao to purchase the properties. As far as 'A' schedule properties are concerned, both the learned counsel have agreed that those properties can be treated as joint family properties. Therefore, there is no need to discuss about 'A' schedule properties in detail. Even in 'A' schedule properties, since D.W.2 himself admitted that his father purchased Item Nos.2C and 2D of 'A' schedule properties from out of his own funds and he claimed 1/3rd share in those items.

Admittedly, Late Surya Rao was having Acs.1.33 cents of land and had been working as clerk in Mandapeta Municipality. It is also an admitted fact that Late Surya Rao had been residing with the plaintiff in his in-laws house. It has to be seen that it is not the case of any party that Late Surya Rao was addicted to any vices or that he was a spendthrift. The evidence on record clinchingly shows that Late Surya

Rao was getting income from Item No.1 of 'A' schedule property and he has acquired 'A' schedule properties with the income derived from the nucleus of the joint family property. Admittedly, H.No.4-5-3 was sold by Late Surya Rao. Though the plaintiff initially contended that the sale proceeds were given to the second defendant towards his share, but it was suggested to P.W.1 that the said sale proceeds were retained by Late Surya Rao himself. The case of the plaintiff is that they were getting 30 bags of paddy per acre from Acs.1.33 cents of land. D.W.3 deposed that he was getting 100 khata bags of paddy from the four acres of land. Thus, according to D.W.3, he was getting about 25 bags of paddy per acre. Thus, it appears that the evidence of D.W.3 itself supports the version of the plaintiff and, in all probabilities, Late Surya Rao was getting about 25 bags of paddy per acre as income from Item No.1 of the 'A' schedule properties, i.e., Acs.1.33 cents of land. It is an admitted fact that Late Surya Rao purchased 7¾ cents of land under Ex.A.6 on 26.04.1983 for Rs.12,500/- and two cents of land vide Ex.A.4 on 29.04.1983 and 7½ cents of land vide Ex.A.5 on 25.05.1983 and Item No.2B of 'A' schedule properties. It is also not in dispute that Late Surya Rao purchased 20 cents of land vide Ex.A.7 on 09.05.1984 in Item No.3 of 'A' schedule properties.

It is argued that Late Surya Rao was sick and he died on 04.10.1987 and he was on leave for several days prior to his death and thus, in all probabilities, Late Surya Rao had no money to purchase the properties in the name of the second defendant. It is true that Late Surya Rao was sick and he died on 04.10.1987 and he was on leave for considerable period prior to his death. But as seen from the entries in Ex.A.32 –

Passbook, Late Surya Rao had deposited an amount of Rs.20,060/- on 01.01.1986 and had withdrawn Rs.10,000/- each on 09.01.1986 and 17.02.1986. Again he deposited an amount of Rs.20,000/- on 29.03.1986 and withdrawn the same on 12.04.1986. Again he deposited Rs.30,000/- on 06.08.1986 and withdrawn the same on 08.08.1986. Similarly, he deposited an amount of Rs.30,000/- on 27.09.1986 and withdrawn Rs.6,000/- on 08.11.1986, Rs.10,020/- on 10.11.1986. Similarly, he had withdrawn an amount of Rs.10,000/- on 21.11.1986, Rs.5,000/- on 19.01.1987. Again on 13.02.1987, he deposited an amount of Rs.30,000/- and on 14.02.1987, he deposited an amount of Rs.3,000/- and withdrawn Rs.10,000/- each on 11.03.1987, 17.03.1987 and 20.03.1987. Again he deposited an amount of Rs.9,000/- on 16.06.1987 and withdrawn the same on 18.06.1987. Again he deposited an amount of 5,500/- on 20.06.1987, Rs.4,500/- on 26.06.1987, Rs.20,000/- on 01.07.1987 and Rs.10,000/- on 02.07.1987 and withdrawn an amount of Rs.40,000/- on 08.09.1987. Thus, it appears that Late Surya Rao was getting sufficient income and he was regularly depositing amount into the account and withdrawing the same till his death. Therefore, it cannot be said that Late Surya Rao had no money or was in financial difficulties before his death. Thus, the above referred purchases and deposits and withdrawals of money by Late Surya Rao *prima facie* show that the income from the nucleus of the joint family property was sufficient to enable Late Surya Rao to acquire the properties.

One of the contentions raised by the learned counsel for the appellant is that Late Surya Rao had to pay maintenance

to his mother, i.e., the first defendant and that he was paying about five bags of paddy from the yield of Item No.1 of 'A' schedule properties and that he was also paying Rs.500/- to his mother towards her maintenance and clothes. Admittedly, mother of Late Surya Rao, i.e., the first defendant was examined as D.W.1. She had not whispered anything in her evidence that she was paid five bags of paddy or Rs.500/- towards maintenance by Late Surya Rao out of the income of the joint family. Admittedly, no such plea was taken by the defendants in their written statement. Therefore, when the first defendant herself did not make any such claim, no credence can be given to the evidence of D.W.2, i.e., the second defendant. In view of the above discussion, it is clear that the plaintiff has discharged her initial burden of proving that there was sufficient income from the nucleus of joint family to purchase the properties. In view of the same and in the light of the settled legal position, now the burden shifts to the second defendant to prove whether the properties acquired by him are his own acquisitions without the aid of the income from the nucleus of joint family property, i.e., without the support of his father.

Point No.2:-

It is not in dispute that an amount of Rs.10,000/-was deposited in the name of the second defendant on 09.02.1979. It has to be seen that the deposit is made in the Municipal employees Cooperative Credit Society, Mandapeta. It is an admitted fact that Late Surya Rao was working as clerk i n Mandapeta Municipality. Since the original deposit form and the original extract of register are not available, it cannot

be ascertained as to who actually deposited the said amount into the Society. It appears that while withdrawing the interest, the second defendant signed as per the recitals in Ex.X.22 dated 01.03.1979. Admittedly, the second defendant was born in the year 1960 and he must be around 19 years when the said deposit was made. It is not the case of the second defendant that the said amount was deposited by his maternal grand father – D.W.3. Neither D.W.1 nor D.W.3 whisper anything about the fixed deposit made in the Mandapeta Municipal Employees Cooperative Credit Society. Having regard to the fact that Late Surya Rao was working in Mandapeta Municipality and that the said fixed deposit was also made in the Mandapeta Municipal Employees Credit Society and that the second defendant was the only son of Late Surya Rao and aged 19 years and not earning as on that date, it has to be reasonably inferred that the said deposit of Rs.10,000/- was made by Late Surya Rao in the name of the second defendant. The properties shown in 'B' schedule, one after another, were purchased from the year 1983 onwards. The second defendant (D.W.2) admitted in his evidence that he was not employed anywhere before his marriage. He was married in November, 1983. Thus, as on 09.02.1979 or till 1983, he was not working anywhere. His case is that his maternal grand parents used to present him gifts on the occasion of his birthday every year and other festivals. Admittedly, he has not deposited any amount received by way of presentations in his bank account. It is not in dispute that Item Nos.4 and 5 of 'B' schedule properties were purchased on the same day when Late Surya Rao purchased the properties covered under Ex.A.2 and A.3.

The source of income for purchasing Item Nos.4 and 5 of 'B' schedule properties, according to the second defendant, is the interest which he used to get from the Fixed Deposits from the Municipal Employees Cooperative Credit Society and also the monies given by his maternal grand parents. He has also claimed that he married a girl from affluent family.

D.W.3 – Bikkina Tatabbaiah is the maternal grand father of the second defendant. He has two sons and one daughter. One daughter died. One of his sons is an engineer and another is a doctor. The first daughter is Late Sarojini, the mother of the second defendant. According to D.W.3, for every festival, himself and his wife were individually giving Rs.500/- to the second defendant and Rs.1,000/- on his birthday every year. According to the second defendant, he used to keep the amount in a box. Thus, except the oral evidence of D.W.2 and D.W.3, there is no other evidence to show that the second defendant saved the money given by his maternal grand parents and deposited the same into the Society. According to D.W.3, he is having four acres of land – 3 acres of land in his name and one acre of land in the name of his wife. He has filed the certified copies of the registered sale deeds and specifically pleaded that he is not in a position to produce the original documents. Learned counsel for the respondents argued that D.W.3 is not the real owner of those lands and that his son, who is practicing as a doctor, purchased those lands in the name of D.W.3 and, therefore, D.W.3 is not in a position to file the original title deeds. Admittedly, the original title deeds have not been filed. The only explanation given by D.W.3 is that the originals of Exs.X.1 to X.6 were not found and thus he brought the certified copies of the registered sale

deeds. According to the learned counsel for the respondents, those certified copies were obtained only just before D.W.3 was examined as a witness in November, 1994. Admittedly, D.W.3 was examined on 22.12.1994. Leaned counsel for the respondents has referred to the evidence of D.W.3, wherein, he admitted that he does not remember in whose name he got registered the sale deeds in respect of 0.50 cents of land under Ex.X.2. When he was asked about the name of the vendor of the land purchased under Ex.X.1, he says that he does not remember the name of the vendors. Thus, he is not in a position to give the names of the vendors or the amounts shown under the originals of Ex.X.3. D.W.3 further admitted that he does not have any document or any evidence to show that he has been in possession of the property covered under Exs.X.1 to X.6. He has also admitted that his son has been working as doctor since 12 to 14 years. Thus, in all probabilities, it appears that D.W.3 had no sufficient income to give sufficient amount to the second defendant to enable him to purchase the properties.

The second defendant claims that his father-in-law is an affluent person and he has presented Rs.20,000/- as gift to him. Of course, D.W.3 also deposed that himself and his wife had given Rs.20,000/- each as gift to the second defendant. It is also his case that the relatives who attended the marriage, have contributed about Rs.15,000/- to Rs.16,000/- by way of gifts. Except this oral evidence, there is no other evidence to support the version of D.Ws.3 and 4. It is brought out in the evidence that it is customary to maintain a list of the presentations presented at the time of marriage and D.W.3 admitted that he is not having the paper on which the

presentations and gifts received at the time of second defendant's marriage were noted. D.W.4 also admitted that it is a general practice to write down the list of the presentations who gave "chadivimpulu" at the time of marriage. He has also assigned reasons for such custom that such a list will be prepared with an intention to refer and reciprocate in the same manner. As far as the financial position of D.W.4 – the father in law of the second defendant is concerned, he admitted in the cross examination that he has not filed any documents to show that he has got 8 acres of land and his wife got 3 acres of land. It has to be seen that D.W.4, in his cross examination, admitted that he sold away his house site to Late Surya Rao in Ex.A.13 and that the sale deed was taken in the name of the plaintiff. He has also admitted that he had borrowed Rs.8,000/- from the plaintiff. The fact that D.W.4 sold away his property to the plaintiff and subsequently obtained a loan of Rs.8,000/- under Ex.A.20 from the plaintiff on 17.01.1985 reveals that he was not financially sound to help the second defendant. Of course, he claimed that he paid the amount, but, admittedly, he did not take back Ex.A.20 promissory note. According to D.W.4, he does not know what second defendant did with Rs.25,000/- given by him at the time of second defendant's marriage. It has to be seen that though the second defendant was married in the year 1983, Late Surya Rao and the second defendant jointly sold the house under Ex.A.3 on 03.02.1984. The plaintiff, second defendant and their other family members, commenced business in the name and style of "Laxmi Agencies" in the year 1984. It has to be seen that the plaintiff, her mother and wife of the second defendant have got each 12 paisa share and second

defendant has got 16 paisa share in the said business. Thus, it appears that not only the second defendant, but the plaintiff also seems to be receiving profits, if any, earned by said 'Laxmi Agencies'. The second defendant purchased 50 cents of vacant site under Ex.A.10 which is Item No.3 of 'B' schedule properties. The specific case of the second defendant is that he obtained a loan of Rs.45,000/- from "Laxmi Agencies" and with that amount, he purchased this property.

Item No.4 of 'B' schedule properties was purchased on 26.04.1983 for Rs.15,000/-. As far as Item No.3 of the 'B' schedule properties is concerned, the second defendant claims that he purchased Item No.3, i.e., 50 cents of vacant site on 02.04.1985 for Rs.40,000/- under Ex.A.10 sale deed. Admittedly, original sale deeds of Item Nos.3 and 4 are in the name of the second defendant. He claims that he had taken a loan of Rs.45,000/- from "Laxmi Agencies" and purchased this property. As far as the business of "Laxmi Agencies" is concerned, admittedly, the plaintiff and her mother have shares as discussed above. D.W.2 admitted that he has not executed any document in favour of "Laxmi Agencies" for taking a loan of Rs.45,000/- and there is no document to show that he agreed to pay the interest at the rate of 18% to "Laxmi Agencies". He further admitted that he has not filed any documents to show that interest was calculated at 18% per annum and it was deposited into the account. He further admitted that the statement made in the additional written statement in Para No.4 that he had withdrawn Rs.45,000/- from the amounts lying into his credit in the account is not correct. He further deposed that he stated so to his advocate by mistake. He further admitted that there is no entry in the

day book or ledger showing that any other partner was given loan. Subsequently, he has filed Ex.B.1 – daily chitta containing the relevant entry. He further admitted that date is not mentioned against each entry. According to him, at page No.47 of the book containing Ex.B.1, there is an entry with regard to the interest said to have been paid by him towards the loan taken from the society. The said entry is Ex.B.22. He further deposed that though he is having subsequent books with him, he has not filed them, according to him, they are not relevant. He has also admitted that Ex.B.22 is dated 31.07.1985 and the next entry also contains the same, i.e., 31.07.1985. According to him, his accountant committed a mistake and that he cannot say the reason. He denied the suggestion that subsequent entry dated 31.07.1985 was subsequently inserted. Since the subsequent registers are not filed and admittedly, the registers were in the custody of the second defendant, the version of the second defendant that he had obtained the loan of Rs.45,000/- and with that money, he purchased Item No.3 of 'B" schedule property on 02.04.1985 seems to be incorrect and improbable.

Though the second defendant has deposed that he was doing milk business and earning money, but as seen from the contents of the written statement, the second defendant had not taken any specific plea about the income from the milk business. In fact, there is no whisper about the milk business in the written statement.

As far as Item Nos.6 to 9 are concerned, the case of the second defendant is that he purchased those items with the monies collected from D.Ws.5 and 6 and also from the income

of Item Nos.3 to 5 of 'B' schedule properties and also with the income derived from the milk business.

As far as the evidence of D.Ws.5 and 6 are concerned, there is no documentary evidence to show that the plaintiff had lent money to them. In the absence of any documentary evidence, the oral version of D.Ws.5 and 6 cannot be accepted.

As discussed above, the evidence of D.W.2 with regard to the income and title to the properties, is not satisfactory. Therefore, it cannot be said that D.W.2 purchased these properties with the savings from the presentations given by his maternal grand parents. It has to be seen that the properties purchased in the name of Late Surya Rao and in the name of the second defendant are adjacent to one another. Since Late Surya Rao had no other expenditure and he was residing in his in-laws house, it appears that he could save the income from his salary and also the income derived from Acs.1.33 cents of land of joint family property and Late Surya Rao himself seems to have purchased these properties in the name of his son, i.e., the second defendant. As far as the two cents of land purchased under Ex.A.4 which is contended to be not available and occupied by the local people and used as road is concerned, the same cannot be a ground to delete the said property from the joint family property.

However, there cannot be any doubt to say that the interest on the Fixed Deposit was received by the second defendant as seen from the recitals of Ex.X.14, but the same cannot be treated as independent income of the second defendant.

In view of the above discussion, it is clear that the second defendant failed to show that he had independent source of income and capacity to purchase Items Nos.3 to 5 of 'B' schedule properties. It is his case that the income derived from them was used for purchase of Item Nos.6 to 9 of 'B' schedule properties. Once it is held that the second defendant had failed to prove that item Nos.3 to 5 are his self acquisitions, Item Nos.6 to 9 of 'B' schedule properties have to be treated as purchased from the income of nucleus of the joint family properties. Item No.2 of plaint 'B' schedule properties was purchased on 23.05.1987 under Ex.A.12. The house site of 584.5 square yards was purchased for Rs.15,000/- and subsequently, a building has been constructed on it. According to the second defendant, the source of income to purchase the same is the interest drawn on the fixed deposit from the Municipal Employees Cooperative Credit Society and also from the lands, i.e., Item Nos.3 to 9. We have already held that when the deposit was made into the society, the second defendant was only aged about 18years and he had no independent source of income and as far as the lands purchased by the second defendant are concerned, we have already held that the second defendant failed to prove that he had independent source of income to purchase those properties. It has to be seen that the property under Ex.A.12 was purchased on 23.05.1987. The plaintiff has filed the bank pass book of Late Surya Rao and the entries in the said passbook reveal that Late Surya Rao had withdrawn Rs.10,000/- on 11.03.1987, Rs.10,000/- on 17.03.1987 and 20.03.1987. Admittedly, the property under Ex.A.12 was purchased on 23.05.1987. Thus, just before purchasing the

property under Ex.A.12, Late Surya Rao had withdrawn about Rs.33,000/-. Late Surya Rao had also subsequently withdrawn Rs.9,000/- on 18.06.1987 and Rs.40,000/- on 08.09.1987. Admittedly, the second defendant had not filed any bank account or any other document to show his income. Of course, he had deposed that he was doing milk business, but no account books or any documents have been filed to show the income from his milk business.

In the light of the above discussion, it has to be held that the second defendant failed to prove that the properties were purchased with his own earnings or savings and that the income from the nucleus of joint family was sufficient to purchase the 'A' and 'B' schedule properties except the house purchased in the name of the second defendant.

Learned counsel for the appellant has relied on the judgment in the case between ***Pabbathi Anjaneyulu Vs. Pabbathi N.Rathnamaiah Chetty and others***[1] in support of his contention that there cannot be any presumption that any property held by the members of the joint family is joint family property. In the said decision, it has been observed as follows:-

> "Even if proof of joint family exists, that does not lead to the presumption that the property held by a member of the family to be joint unless anyone asserting that any item of the property is joint and establish the same by acceptable evidence."

It was also observed as follows:-

> "The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. It is also to be noted that if the

> party who asserts it to be the joint family property and proves that there was sufficient joint family funds from and out of which the said property could have acquired, then the burden shifts on to the member of the family who set up the claim that it is his personal property and has been acquired without any assistance from the joint family property/funds."

For the same preposition, learned counsel for the appellant had also relied on the judgment in the case between ***D.S.Lakshmaiah and another Vs. L.Balasubramanyam and others***[2].

Thus, the main contention of the learned counsel for the appellant is that it is only after the possession of an adequate nucleus is shown, the onus shifts on to the person who claims the property as self acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

For the same preposition, learned counsel for the appellant had also relied on the judgment in the case between ***Srinivas Krishnarao Kango Vs. Narayan Devji Kango and others***[3]. Thus, appears that the important thing to be taken into consideration is whether the income which the nucleus of the joint family yields was sufficient to acquire properties.

Similar view was taken by the Apex Court in the case between ***Mst. Rukhmabai Vs. Lala Laxminarayan and others***[4], which has been relied on by the learned counsel for the appellant.

Learned counsel had also relied on the decision in the case between ***Mallesappa Bandeppa Desai and another***

Vs. Desai Mallappa alias Mallesappa and another[5]. In that case, the manager of the joint hindu family claimed that he had acquired the immovable property. In the facts and circumstances of the case, the Apex Court observed as follows:-

> "Where a manager claims that any immovable property has been acquired by him with his own separated funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separated fund. The onus of proof must in such a case be placed on the manager and not on his coparceners."

Learned counsel for the appellant had also relied on the judgment in the case between ***V.Srisailam Vs. V.Krishna Murthy and others***[6] and ***Mallipudi Narasimhamurthy Vs. Mallipudi Nagabhushanam***[7] for the same preposition.

Learned counsel for the appellant had also relied on the judgment in the case between ***Dr.Gurmukh Ram Madan Vs. Bhagwan Das Madan***[8]. In that case, the plaintiff claimed half share. The case of the defendant was that the plaintiff had no right, title or interest in the suit house and the same belongs to him exclusively. There was no evidence to show that the plaintiff had made any contribution towards purchase of the suit house or in the construction of the house thereof. In that case, the title deeds stood in the name of the defendant. He had also placed material to show that he had purchased the building material at different stages to raise construction and he was in possession of the property. The Apex Court

confirmed the judgment of the trial Court dismissing the suit. On facts, the decision can be distinguished.

Learned counsel had also relied on the judgment in the case between ***Mudigowda Gowdappa Sankh and others Vs. Ramchandra Revgowda Sankh (dead) by his legal representatives and another***[9] for the same preposition.

Learned counsel for the appellant had also relied on the judgment in the case between ***Tanjore Kannammal Vs. Tanjore Ramathilakammal and another***[10]. In that case, three dancing girls were living together and only one of them was earning. The house was purchased by the earning member in her own name. In the circumstances, it was held that the house cannot be presumed to be purchased for the benefit of the whole family when there is nothing to show that there were any joint funds for the purchase of the house. It was also observed that basing on the facts and circumstances of each particular case, presumptions have to be drawn.

Learned counsel for the appellant had also relied on the judgment in the case between ***Randhi Appalaswami Vs. Randhi Suryanarayana Murti***[11], for the same preposition.

Learned counsel for the appellant, relying on the judgment in the case between ***P.S.Sairam and another Vs. P.S.Rama Rao Pisey and others***[12], submitted that merely because 'Lakshmi Agencies' was functioning in the house which was in the name of the plaintiff, it cannot be said that it is a joint family business. It is nobody's case that 'Lakshmi Agencies' is a joint family business. The plaintiff never said

that it is a joint family business. Admittedly, the plaintiff, her mother, the second defendant and his wife were having shares in 'Lakshmi Agencies'. It is an admitted fact that 'Lakshmi Agencies' was functioning in the house which was in the name of the plaintiff. However, since it is not the case of the plaintiff that it is a joint family business, the said decision does not help the appellant / second defendant.

As far as Item No.1 of plaint 'B' schedule properties is concerned, admittedly, the said property was purchased after the plaintiff has issued legal notice and, therefore, the finding of the Court below on this aspect need not be disturbed. In view of the same, there is no need to discuss the decision in the case between ***Hardeo Rai Vs. Shakuntala Devi*** *[13]* relied by the learned counsel for the appellant.

Though as per the pleadings of the defendants 1 and 2 and the evidence of D.W.2, the second defendant is entitled to only 1/3rd share in Item Nos.2C and 2D of plaint 'A' schedule property, but the Court below has passed a decree dividing the said items into six equal shares and allotting one such share to the plaintiff. Since no cross appeal has been filed by the plaintiff, there is no need to disturb the findings of the Court below.

Point No.5:-

A vacant site of 0.50 cents was purchased in the name of the plaintiff vide Ex.A.13 dated 20.05.1981. The plaintiff applied seeking permission for construction of house and also submitted the blueprint to the municipality in her own name.

The specific case of the plaintiff is that her parents gave two acres of land at the time of her marriage and she sold one acre of land on 11.06.1976 under Ex.A.17 for Rs.13,000/-. Of course, according to the plaintiff, the actual value is Rs.30,000/- but only for the purpose of registration, the value was shown as Rs.13,000/- in the sale deed. D.W.4 – the father in law of the second defendant himself deposed that he sold a house site to his son-in-law Late Surya Rao for Rs.20,000/- and that the value mentioned in the documents will be less than the actual value under Ex.A.39. The evidence of D.W.4 supports the version of the plaintiff (P.W.1). Therefore, the evidence of P.W.1 cannot be brushed aside on this aspect. It is also her case that she sold the remaining one acre of land under Ex.A.8 on 04.09.1980 and the sale consideration is shown as Rs.14,000/-, but according to P.W.1 (plaintiff), the actual price is Rs.50,000/-. The plaintiff's case is that with the above mentioned sale proceeds, she purchased 0.50 cents of land under Ex.A.13 and constructed the house thereon in 1982 by investing Rs.46,000/-. D.W.1 (first defendant) deposed that her son purchased the house site in the name of the plaintiff and constructed the house in the name of the plaintiff since she had no issues. It is the case of the first defendant that her son and the second defendant, comprising of the joint family, purchased the site at Mandapeta in which, Late Surya Rao constructed the building bearing door No.17-1-41 with the sale proceeds of the house bearing No.4-5-3 and also a portion of the sale proceeds under Ex.A.3 sale deed dated 03.02.1984. It has to be seen that the house No.4-5-3 was sold under Ex.A.2 on 28.06.1973 for Rs.8,000/- It is the case of the plaintiff that the said sale proceeds were given to

the second defendant. It is suggested to the plaintiff that Late Surya Rao retained the sale proceeds of the said house. The house was sold in the year 1973, but the disputed house site was purchased on 20.05.1981 and permission, along with the approved blueprint, was obtained on 25.05.1984. After Late Surya Rao sold the property in Ex.A.2, much water had flown and Late Surya Rao purchased several other properties. Late Surya Rao purchased Item No.2-D of 'A' schedule properties, i.e., Acs.0.07¾ cents of land under Ex.A.6 on 26.04.1983 for Rs.4,800/- and two cents of land in Item No.2A for Rs.1,200/- on 29.04.1983. It is also not in dispute that Late Surya Rao and the second defendant jointly purchased 7½ cents of vacant site, i.e., Item No.2B of 'A' schedule properties under Ex.A.5 on 25.05.1983. Late Surya Rao and the second defendant jointly sold 40 cents of vacant site standing in the name of the mother of the second defendant vide Ex.A.3 on 03.02.1984 for Rs.20,000/- and 20 cents of land in Item No.3 of 'A' schedule properties vide Ex.A.7 on 09.05.1984 for Rs.5,000/-. There cannot be any doubt to say that Late Surya Rao was purchasing properties and he had sufficient money. It is also a fact that he sold the house site as referred above. But the question is whether the plaintiff sold her two acres of land and purchased the house site and constructed the house thereon or whether the said property was acquired by Late Surya Rao.

The defendant No.1 is the mother of Late Surya Rao. When she was asked about the construction of the house by the plaintiff, she replied that she does not know whether P.W.1 got two acres of land and whether she sold the same and purchased of 50 cents of land and constructed a house therein

from out of the sale proceeds of her two acres of land. D.W.1 has not denied the same, but she pleaded ignorance about the same. Of course, according to her, her son informed that the land and the house, though stand in the name of P.W.1, do not belong to her. Though Late Surya Rao was also having capacity and money to purchase the properties, but the fact remains that the plaintiff has sold her two acres of land under Ex.A.17 and Ex.A.18 and had her own money. Thus, in all probabilities, it appears that the sale proceeds received by way of sales made under Ex.A.17 and Ex.A.18, seems to have been used by the plaintiff for construction of the house bearing No.17-1-41, and, therefore, in the absence of any specific evidence to show that it was constructed with the funds of the joint family property, it has to be held that it is the self acquired property of the plaintiff. Admittedly, the municipal permission is obtained in the name of the plaintiff. It appears that the defendants did not raise any objection when the plaintiff obtained permission in her name from Municipal office for constructing the house. Of course, P.W.1 admitted that there is no documentary evidence to show that she herself constructed the house, but having regard to the fact that she sold two acres of land given to her by her parents, it appears that her claim that she purchased the house site and constructed the house with her own money cannot be doubted. It has to be seen that the Court below has not discussed this point in detail and no issue was framed on this point. Since there is sufficient evidence on record on this issue, it appears that there is nothing to remand the matter to the Court below to decide this issue at this belated stage. In view of the above discussion, the Cross Objections in XOBJ(SR) No.62620 of 1998 filed by

the first defendant is dismissed.

Point No.3

Now let us see whether the pleadings or the evidence of the plaintiff in which she stated that there was a partition between Late Surya Rao and the second defendant amounts to an admission and make her disentitle to claim a share in 'B' schedule properties. The learned counsel for the respondents submitted that whether the parties are arrayed as plaintiffs or defendants, but each party has to be treated as plaintiff in a suit for partition and this submission appears to be as per the settled legal position and other side counsel could not show any decision in which any *contra* view was taken. Admittedly, the defendants themselves have taken a specific plea that there was no partition between Late Surya Rao and the second defendant, therefore, though the plaintiff pleaded that there was a partition between Late Surya Rao and second defendant and also asserted so in her evidence, but the trial Court has given a specific finding that there was no partition between Late Surya Rao and the second defendant. Since the finding has been given as per the plea taken by the defendants themselves, it appears that the defendants cannot challenge that finding. Though the first defendant filed cross appeal, but the said cross appeal is limited to the extent of the finding given by the trial Court with regard to Item No.1 of 'B' schedule properties. Though the learned counsel for the appellant vehemently contended that the plaintiff cannot probate and reprobate and cannot take inconsistent pleas, but since the subsequent plea taken by the plaintiff is in consonance with the pleas taken by the defendants, now the

defendants cannot turn back and say that Late Surya Rao and the second defendant were not joint.

The word 'admission' has been defined under Section 17 of the Indian Evidence Act as follows:-

> "An admission is a statement, oral or documentary or contained in electric form, which suggests any inferences as to any fact in issue or relevance fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned"

It is also settled law that an admission made by a person cannot be split up and part of it can be used against him. In fact, the correct meaning of the word 'admission' appears to be when a party in proceedings has made a statement or taken a stand and when the other side has admitted the same as true, the same amounts to admission. Thus, even when a party admits the plea or the stand of a party in earlier proceedings, the same also can be treated as an admission.

In Wigmore's Evidence, 1095 Ed., Page 1226, the word 'admission' has been defined as follows:-

> An "Admission" in the correct sense is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence by conceding for the purposes of litigation that the proposition of fact claimed by the opponent is true"

Order VIII Rule 5 of C.P.C. envisages that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except

as against a person under disability. There is no other provision in C.P.C. imposing such a condition on the plaintiff to deny the allegations of fact made by the defendants in their written statement.

Though it is argued that the plaintiff has admitted that there was earlier partition, mere pleadings or a version of a party, in my view, cannot be considered as an admission. Admission means admitting the fact which is asserted by other party. When a party pleads that there is a partition and when the other side disputes the same, it becomes a disputed fact and when it is a disputed fact, the Court has to give a finding on the said disputed fact. Of course, at a subsequent stage, a party cannot be permitted to take a *contra* stand to the earlier stand taken by the said party. The conduct of the parties and all subsequent events have to be conjointly examined and reasonable conclusions basing on the probabilities of the case have to be drawn. In the instant case, the facts and circumstances and the chronological events give an impression that in all probabilities, there was no partition between Late Surya Rao and the second defendant. It is common knowledge that in joint Hindu families, though the parties enjoy the properties separately and may be in exclusive possession of certain residential portions or shops, but those circumstances may indicate only an oral understanding between the parties, but unless there is actual partition by metes and bounds, it cannot be said that there is actual partition among the joint family members. Merely because the parties are living separately or doing separate business or even purchased properties in their individual name, it cannot be said that there is partition between them.

It is argued by the learned counsel for the appellant that the plaintiff, in her pleadings and evidence, admitted that there was earlier partition and, therefore, now she cannot claim that 'B' schedule properties are also joint family properties nor say that there was no earlier partition between Late Surya Rao and the second defendant. It is a fact that the plaintiff has made a specific plea that there was a partition between Late Surya Rao and the second defendant and Item No.1 of 'A' schedule property was allotted to Late Surya Rao and the house site of 40 cents of land was allotted to the second defendant and in her evidence also, she has stated so. It has to be seen that it is the original case of the plaintiff that there was an earlier partition and, therefore, she is entitled to 1/3rd share in 'A' schedule properties. Admittedly, the defendants denied the said plea of the plaintiff and had taken a specific stand that there was no earlier partition between Late Surya Rao and the second defendant. They had specifically pleaded that Late Surya Rao and the second defendant were together as members of the joint family till the death of Late Surya Rao. Therefore, the issue whether there was a partition between Late Surya Rao and the second defendant has become an issue of controversy, the same has to be decided by the Court. Had the defendants accepted the plea of the plaintiff as true, the plaintiff would have got 1/3rd share in ‘A’ schedule properties. Probably, with a view to deny her 1/3rd share and to reduce her share to 1/6th share, the defendants had taken the plea that there was no partition between the plaintiff and Late Surya Rao. If at all the Court accepted the version of the defendants, the plaintiff would have got only 1/6th share in ‘A’

schedule properties. It is a fact that subsequently, the plaintiff had filed an application seeking amendment of the plaint adding ‘B’ schedule properties. She had taken a specific plea that the second defendant was very young and had no independent means or source of income to acquire any property and that 'B' schedule properties were also acquired by Late Surya Rao. It is therefore contended that if the contentions of the second defendant are taken as true that himself and Late Surya Rao were members of the joint family property till the death of Late Surya Rao, she pleads that all the properties acquired by Late Surya Rao have to be treated as joint family properties. Thus, it appears that the plaintiff has been making alternative plea while sticking to the stand that there was an earlier partition between Late Surya Rao and the plaintiff and that she is entitled to 1/3rd share in 'A' schedule properties. Since her plea is denied by defendants 1 and 2, she is claiming 1/6th share in all the suit schedule properties. It is not clear from the evidence as to what would be the value of 1/3rd of ‘A’ schedule and 1/6th of ‘B’ schedule properties. In the above circumstances, it cannot be said that the plaintiff is making contradictory pleas.

The subsequent demand of the plaintiff based on the defendants own plea cannot be said to be a surprise to the defendants and, therefore, the plaintiff is not precluded from claiming a share in ‘B’ schedule properties.

It is argued that Late Surya Rao was living at his in-laws house and the second defendant was living with his maternal grand parents and that they never lived together. It is not necessary that the members of the joint family should live

together under the same roof. For various reasons, the members of joint family or coparceners may live at different places and by that circumstance itself it cannot be inferred that they were separate or that there was partition between them. It appears that there were no disputes between the parties till Late Surya Rao died; admittedly, the plaintiff, second defendant, mother of the plaintiff and the wife of the second defendant were the partners in the business viz., 'Laxmi Agencies'. Admittedly, 'Laxmi Agencies' was started in the house of the plaintiff.

Sri Krishna Murthy, learned counsel for the appellant had relied on the judgment in the case between ***Gannmani Anasuya and others Vs. Parvatini Amarendra Chowdhary and others***[14]. In that case, the plaintiffs filed a suit for partition seeking a direction to the defendants to render proper accounts in respect of certain business. It was contended on behalf of the appellants that the trial Court and the High Court committed serious errors insofar as they failed to take into consideration the effect of Ex.B.8 (in that case). It was also contended on behalf of the other side that Ex.B.8 does not contain any signature of any party nor any amount was paid in pursuant thereto in full and final settlement of the account. It appears that the first defendant accepted the contents of Ex.B.8. In the above circumstances, the Apex Court observed that Ex.B.8 should have received serious consideration in the hands of the Courts below. The Apex Court further observed as follows:-

> "An admission made by a party can be used against him. When such admission is made by a Karta of the Hindu undivided family, who is managing

> the family property as well as family business affairs, the same would be a relevant fact. When a claim was made by the plaintiffs for rendition of accounts in the lis, issuance of a document purported to have been authored by one of the parties, in our opinion, was required to be taken into consideration."

Here, in the instant case, there is no such admission made by the plaintiff. Thus, this decision is distinguishable on facts.

Learned counsel for the appellant had also relied on the judgment in the case between ***Steel Authority of India Ltd. Vs. Union of India and others***[15]. In that case, the dispute was whether the first party union employees were contract workers or directly employed by the management. In that case, on facts, it was found that previously, the union had taken a definite stand that the workers were working under the contractors. When the Union had taken a stand that the employees were workmen of the principal employer, subsequently, the Apex Court held that it was a mutually destructive plea and impermissible in law. In the instant case, there is no such mutually destructive plea. The plaintiff claimed 1/3rd share in 'A' schedule properties as per the earlier pleadings and pleaded that there was earlier partition between Late Surya Rao and the second defendant and when the defendants specifically denied the earlier partition, the plaintiff had averred that if the contention of the defendants is accepted as true, all the properties including the 'B' schedule properties have to be treated as joint family properties and she would be entitled to 1/6th share. The question is whether there was an earlier partition or not. Both the parties have taken

contradictory stands. In the above circumstances, it appears that the Court has to decide whether there was a prior partition or not.

Leaned counsel for the appellant had also relied on the judgment in the case between ***Smt. Mallamma Vs. Smt. Nanjamma and others***[16]. In that case, the plaintiffs' suit for partition was dismissed. They, however, contended that the first plaintiff's thump impression was fraudulently obtained by the defendant's brother-in-law on the pretext that the same is required to change the name of the Karta of the joint family properties. The defendants pleaded earlier partition. The plaintiff's contended that there was no earlier partition, but in her evidence, she admitted that the panchayatdars at the partition fraudulently obtained her thumb impression. Subsequent plea that earlier partition was unequal one was treated as departure from the original pleadings. The subsequent plea that there was unequal partition clearly contradicts the earlier plea that there was no partition. Here, in this case, there is no such mutually contradictory pleas by the plaintiff. At the cost of repetition, it has to be observed that the subsequent plea of the plaintiff in this case is that since the defendants pleaded that there was no earlier partition, 'B' schedule properties should be treated as joint family properties.

Learned counsel for the appellant had also relied on the judgment in the case between ***R.N.Gosain Vs. Yashpal Dhir***[17]. In that case, the landlord initiated proceedings against the tenant under Section 13A of the East Punjab Urban Rent Restriction Act, 1949. The landlord, claiming to be

a ‘specified landlord’ within the meaning of Section 2(hh) of the said Act, moved a petition seeking eviction of the tenant. The said petition was dismissed holding that the landlord did not fall within the ambit of the definition of ‘specified landlord’. When the landlord went to High Court, the High Court found that the landlord had fully satisfied the definition of ‘specified landlord’ and ordered eviction and granted one month time to the tenant to evict the premises and, however, directed the tenant to pay the arrears within 15 days from the date of the said order and to file undertaking that he shall handover the premises before expiry of the aforesaid period. Then the tenant filed an application seeking three months time to vacate the house and for waiving the requirement of filing the undertaking. The said petition was rejected. Then he gave an undertaking before the Rent Controller that he will vacate the premises and handover the possession within one month as per the order of the High Court, subject to filing of SLP before the Apex Court. The Apex Court, in the above circumstances, observed that having elected to avail the protection from eviction under Order dated 06.03.1992 passed by the High Court, by filing the requisite undertaking, the petitioner cannot be permitted to assail the said order. The Apex Court further observed as follows:-

> “Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid any thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage".

Sri Krishna Murthy, learned counsel for the appellant had also relied on the judgment in the case between ***Jadho Nagu Bai and another Vs. Jadho Gangu Bai*** [18]. The main question that arose for consideration in that case is whether Kedar Rao was carrying on any business of money lending and possessed considerable cash and left large sums of money and assets to the tune ofRs.20,000/-. There was sufficient evidence and admissions in several documents, the copy of the plaint filed in earlier suit etc., and show that Kedar Rao was indebted to several persons and his mother's maintenance amount was used to repay the debts. Whether the admissions were true or not and how they have to be considered came up for consideration before this Court. It was observed that although admissions construed good evidence against the party making them and his representatives in interest, it is not conclusive and unless those admissions operate as estoppels, the party is at liberty to show that they were mistaken or untrue. It was further observed as follows:-

> "The effect of admissions is merely to shift the onus of disproving them on the party making them unless a plea of estopel can be successfully invoked. The evidentiary value of admissions depends upon the circumstances on which they are made and the possibility of incorrect statements being misguidedly made by ignorant persons should not be overlooked. If it is proved by other evidence that the facts admitted cannot be true, no Court of justice will hesitate to give effect to that conclusion."

On the other hand, learned counsel for the respondents had relied on the judgment in the case between ***Firm Sriniwas Ram Kumar Vs. Mahabir Prasad*** [19]. It is a suit for specific

performance. The plaintiffs case is that the defendant agreed to sell their house for a consideration of Rs.34,000/- and out of Rs.34,000/-, a sum of Rs.30,000/- was paid by the plaintiffs. The defendants though denied the agreement of sale, but admitted that the plaintiff did advance Rs.30,000/- by way of loan and not as part payment of sale consideration. The suit for specific performance was dismissed, but a money decree was given in favour of the plaintiff for Rs.30,000/- against the defendants. The matter was carried to High Court. The High Court agreed that a sum of Rs.30,000/- was advanced as loan, but however, dismissed the suit in its entirety holding that it is not the case of the plaintiff that the plaintiff advanced a loan of Rs.30,000/- to the defendants. When the matter was carried to the Apex Court, the Apex Court observed as follows:-

> "It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs. 30,000 was advanced by way of loan to the defendant second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made,

> was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings."

Thus, it appears that when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.

Learned counsel for the respondents had also relied on the judgment in the case between ***Abdul Latif Sahib and others Vs. Shaik Dastagir Sahib and others***[20]. In that case, the suit lands constituted Inam lands granted in favour of an institution. But the defendants had taken a plea in the written statement that the suit lands were persona inam grants burdened with service. However, the evidence proved that the lands constituted grants in favour of an institution. The Court observed as follows:-

> "The statement made by the defendants in ignorance of the true position as regards the nature of their relations with the suit lands, in our view, cannot be a valid reason preventing this court from examining the nature of the suit properties."
>
> "No doubt, it is a general rule that no relief should be granted if it is not founded on the pleadings. When the suit in question was for

> partition, necessarily the question would arise, either directly or indirectly, as to whether the properties were liable to partition and in such an enquiry, examination of the nature of the properties would become inevitable."

Learned counsel for the respondents had also relied on the judgment in the case between ***Kasetty Ampaiah Vs. Pedda Alpuramma and others***[21]. In that case, suit for partition and separate possession of the suit schedule property was filed. The statement made before the Land Reforms Tribunal was sought to be used that there was an earlier partition. This Court, referring to the judgment of the Privy Council and a judgment of a Division Bench, observed as follows:-

> "In the case of *Venkatapathi v. Venkatanarasimha (3) AIR 1936 PC 264,* exercise rules provide that the holder of one licence shall have no interest in the sales under another licence. Two brothers made a statement before the concerned authority that they were divided from each other and one brother succeeded in obtaining licence for selling arrack liquor and another brother toddy liquor in the same District. On compliant, it was found that both these brothers were joint in mess, residence and property. It was held by a Full Bench of Privy Council that if some times happen that persons making a statement which serve their purpose or proceed upon ignorance of the true position and it is not for their statements, but their relations with the estate, which should be taken into consideration in determining the issue. The question in that case was whether both the brothers were joint or not. This principle has been followed in the case of *C.Bommul Reddy v. C.R.Bommul Reddy (4) 1989(3) ALT 365* by a Division Bench of this Court, wherein the question was whether the parties to the suit had effected partition of the joint Hindu family or not.

> It appears that either under the influence of the appellant or with a view to save assets from the rigours of the Land Reforms Act, the appellant and the deceased *Thippaiah* had made wrong declarations and incorrect statements before the Land Reforms authorities under the provisions of the Land Reforms Act. Be that as it may, it can be safely concluded that late *Thippaiah* had made the statement regarding partition of the joint hindu family property to serve his purpose or had proceeded upon ignorance of the true position and, therefore, his statement should not be taken into consideration. But, his relationship with the estate should be taken into consideration in determining the issue of jointness between him and the appellant."

For the same preposition, learned counsel had also relied on the judgment in the case between ***Alluri Venkatapathi Raju and another Vs. Dantuluri Venkatanarasimha Raju***[22].

In the instant case, the case of the plaintiff is that after the death of Late Surya Rao, there was partition between Late Surya Rao and the second defendant. Admittedly, there is no partition deed evidencing the same and there is no satisfactory evidence. Admittedly, the plaintiff pleaded that there was partition which is disputed by the defendant. Whether the statement made by the plaintiff can be treated as a statement made in ignorance or only to serve her purpose of claiming 1/3rd share in the property. Since the same has to be decided as an issue of dispute, the plea of the plaintiff looses its importance.

Thus, it can be safely held that the admissions made by the plaintiff do not make her disentitle to seek partition of 'B' schedule properties. This point is answered accordingly.

Point No.4:-

It is not in dispute that the plaintiff filed I.A.No.27 of 1993 seeking amendment to the plaint appending the 'B' schedule properties and the said amendment was allowed by order dated 10.12.1983. It is also not in dispute that there is no challenge to the said order and, therefore, the same became final. The settled legal position is that once an amendment is allowed and the plaintiff carried out the amendment in the original plaint, the amendment relates back to the date of original plaint. The plaintiff's case is that subsequently she had learnt that 'B' schedule properties are also acquired by Late Surya Rao and that the second defendant had no capacity to purchase those properties. Learned counsel for the appellant submitted that the said amendment is barred by limitation under Article 113 of Indian Evidence Act, 1963.

Article 113 of Indian Evidence Act is applicable to the suits for which there is no prescribed period of limitation. Under the said Article, the suit has to be filed within a period of three years when the right to sue accrues. According to the learned counsel for the respondents, Article 110 of the Limitation Act is applicable to the instant case. Article 110 of the Limitation Act is applicable when a person is excluded from the joint family property and when he seeks to enforce the right to share therein; and 12 years period is prescribed from the date when the exclusion becomes known to the plaintiff. Admittedly, Late Surya Rao died on 04.10.1987 and according to the defendants, Late Surya Rao and defendants 1 and 2 were joint till the death of Late Surya Rao. The amendment application has been filed in the year 1993, i.e., admittedly,

within a period of 12 years from the date of death of Late Surya Rao. Admittedly, the suit has been filed in the year 1989. In the circumstances, it can be safely held that Article 110 of Indian Evidence Act is the relevant provision and Article 113 has no application to the facts of the case and, therefore, the amendment is not barred by limitation. This point is answered accordingly.

Though it was argued that the second defendant had alienated the properties in favour of other defendants, but admittedly, those alienations have been made during the pendency of the suit and, therefore, they are hit by the principles of *lis pendens.* It is not in dispute that the allotment of shares and other directions of the Court below with regard to the feasibility of allotting the land purchased by the sixth defendant to his vendor etc., are in accordance with law.

In view of the above discussion and for the foregoing reasons, the appeal filed by the second defendant and the cross objections filed by the first defendant are liable to be dismissed and are, accordingly, dismissed. As far as the written statement schedule properties are concerned, the defendants cannot seek partition of the same. Consequently, the judgment and decree passed by the Court below stands confirmed. However, in the circumstances, no costs.

Justice B.Chandra Kumar

27th February, 2013
Bvv

[1] 2005 (4) ALD 291

[2] (2003) 10 SCC 310

[3] AIR 1954 SC 397(1)

[4] AIR 1960 SC 335

[5] AIR 1961 SC 1268

[6] 2003 (1) ALD 500

[7] 1956 Andhra 255

[8] AIR 1998 SC 2776

[9] AIR 1969 SC 1076

[10] AIR 1927 Madras 38

[11] ILR 1948 PC 440

[12] AIR 2004 Supreme Court 1619

[13] AIR 2008 Supreme Court 2489

[14] AIR 2007 SC 2380(1)

[15] AIR 2006 Supreme Court 3229(1)

[16] AIR 1988 Karnataka 225

[17] AIR 1993 SC 352

[18] AIR 1958 AP 19

[19] AIR 1951 SC 177

[20] 1993 (3) ALT 56 (DB)

[21] 1996 (2) ALD 1025

[22] AIR 1936 Privy Council 264